TETUAN CLOUGH THURAISINGHAM & JEYA MAHESAN

v.

STANDARD CHARTERED BANK MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R2-12-407-2001]
4 DECEMBER 2001

CIVIL PROCEDURE: *Summary judgment - Appeal - Appeal by legal firm against decision of sessions judge allowing bank's claim for sum owed under overdraft facility - Triable issues - Whether bank was negligent in granting overdraft facility without written authority of all partners - Whether partner who requested for overdraft facility acted outside scope of authority - Whether case should go for trial - Banking, partnership current-account and overdraft - Solicitors and partnership*

This was an appeal by the defendant legal firm against the decision of the sessions judge giving leave to the plaintiff bank to enter final judgment against the defendant for the sum of RM109,344.14 with interests. The defendant was a partnership of one KB Thuraisingham ('KBT') and one Jeya Mahesan ('JM'). KBT alleged that JM had acted outside the scope of his authority when he opened a partnership current account on behalf of the defendant with the plaintiff bank and procured an overdraft of RM98,528.66 without any mandate from the defendant. This was in view of the fact that both of them had agreed to maintain a separate client and office account without the other having a right of access to the same. Further, KBT alleged that the plaintiff was negligent in allowing JM to open the said current account without proper investigation.

Held (allowing the defendant's appeal):

[1] KBT need not show a complete defence. All he had to show was that there was a reasonable doubt that the plaintiff was entitled to judgment. (p 847 c)

[2] In opening a new partnership current account with the plaintiff, both KBT and JM were required to give their mandate and authorization to open and operate the said account. This was in line with the plaintiff's rules and regulations in respect thereof. The plaintiff, in granting the overdraft facility, had breached its rules and regulations when it failed to do the following: (1) to obtain and witness a signed written-mandate of authority from both partners of the defendant authorising the said overdraft; (2) to make the relevant inquiries upon request by JM for the said overdraft facility; and

(3) to obtain sanction from its headquarters to authorise the said overdraft. Therefore, there was an issue as to whether the opening of the said current account and the granting of the overdraft facility for a substantial sum without any security were acts of sheer negligence or whether they were an overt act of a sinister motive leading to criminality. There could be a remote possibility that the transaction could be tainted with fraud or illegality. Therefore, the defendant should be given the opportunity to bring the full facts of the transaction to light. The plaintiff could not rely on ss. 7 and 10 of the Partnership Act 1961 as it failed to take reasonable care in opening the defendant's current account. In not following its own rules and regulations, the plaintiff was negligent and therefore could not seek refuge under the said sections. (pp 849 c, f-g, 850 a-e & 852 c-d)

[3] If JM's request for the temporary overdraft was within the course of carrying on the partnership business, then the act of JM would bind KBT regardless of whether it was done fraudulently or for his own benefit. In Malaysia, the business in which solicitors engage in involve the use of their skills and experience in advising, negotiating, drafting commercial contracts, drafting pleadings or affidavits and prosecuting or defending a claim for their clients. A firm of advocates and solicitors like the defendant is not in the trading business, and borrowing of moneys from financial institutions are not part of a solicitor's business. Even if JM had the authority to open and operate the said current account, the request for the overdraft facility was not within the ordinary course of business of solicitors. For KBT to be bound by the acts of JM, there must be an express authority given by KBT or the application for the overdraft facility should have been ratified by KBT. (p 854 b-c, g)

[4] The plaintiff should have obtained a written authority from KBT to confirm JM's request for the overdraft facility since such a request was extraordinary and not in the course of the defendant's business. It followed that there were *bona fide* triable issues that could not be disposed of by way of summary proceedings. The issues were factual and could only be disposed of in a trial. (p 855 b & g)

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Chan King Yue v. Lee & Wong [1962] MLJ 379 ***(refd)***

Chop Cheong Tuck v. Chop Tack Loong & Ors [1934] MLJ 176 ***(refd)***

Higgins v. Beauchamp [1914] 3 KB 1192 ***(refd)***

Gunung Bayu Sdn Bhd v. Syarikat Pembinaan Perlis Sdn Bhd [1978] 2 MLJ 332 ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

Marfani & Co Ltd v. Midland Bank Ltd [1968] 2 All ER 573 ***(refd)***

Miles v. Bull [1968] 3 All ER 632 ***(refd)***

Plumer v. Gregory [1874] LR 18 Eq 621 ***(refd)***

Polkinghorne v. Holland & Anor [1934-35] 51 CLR 143 ***(refd)***

Rubber Industry (Replanting) Board v. Hongkong and Shanghai Banking Corporation [1957] MLJ 103 ***(refd)***

Sukhinderjit Singh Muker v. Arumugam Deva Rajah [1998] 2 CLJ Supp 110 HC ***(refd)***

United Bank of Kuwait Ltd v. Hammound & Ors [1988] 3 All ER 418 ***(refd)***

United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC ***(refd)***

Legislation referred to:

Patnership Act 1961, ss. 7, 10, 12, 13, 14

Rules of the High Court 1980, O. 14 r. 3(1)

Subordinate Courts Rules 1980, O. 26A, O. 26 r. 3

Partnership Act 1890 [UK], s. 5

Other source(s) referred to:

Lindley & Banks on Partnership, 16th edn, pp 251, 264, 591

For the plaintiff/respondent - V Ravindran; M/s Paul Chong & Nathan

For the defendant/appellant - CK Yeoh; M/s Ranjit, Ooi & Robert Low

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:

This is the appellant's/defendant's appeal against the decision of the learned Sessions Court Judge delivered on 11 June 2001 giving leave to the respondent/plaintiff to enter final judgment against the defendant for the sum of RM109,344.14 together with interest at the rate of 14.05% per annum calculated daily on the said sum from 1 September 1998 until the date of judgment and thereafter, interest at the rate of 8% per annum until the date of full realization. The order and the judgment, both dated 11 June 2001 are found at pp. 121

and 124 of the Record of Appeal ("AR"). It is observed that this appeal involves lonely Mr. K.B. Thuraisingam ("KBT") who was at all material times a partner of the defendant firm and defends this action in his personal capacity and it is also observed that this appeal does not in any way involve the other partner of the defendant firm, Mr. Jeya Mahesan ("JM"). It is noted that JM has not taken any steps to defend this action. However, KBT has contended that despite JM's actions and despite the fact that he has taken no steps to defend this action, KBT is entitled to resist this action on the various grounds that will hereinafter appear.

This is a tale of two firm of solicitors, merged for convenience and to attain greater heights but at the end of the day, trampled by the misdeeds and misappropriation of funds committed by a rogue partner leaving the innocent partner to resist a trail of litigation suits filed by parties whose monies were misappropriated by the rogue who has since absconded. Prior to the merger, the two firms of solicitors were known as M/s. Clough Thuraisingam and M/s. Jeya Mahesan & Co. respectively. KBT practised as an advocate and solicitor and a sole proprietor of the firm M/s. Clough Thuraisingam whereas JM, also an advocate and solicitor was the sole proprietor in the latter company. Due to growing work commitments overseas and the view to "go international", the merger of the two legal firms aforesaid was initiated and formulated to operate in the name and style of M/s. Clough Thuraisingham & Jeya Mahesan on 15 March 1997. It was agreed, *inter alia* between KBT and JM:

(i) That each would separately maintain its own respective client and office accounts at different bank;

(ii) That each would exclusively operate its own accounts without the other having any right of access to the same; and

(iii) Any referrals of work by one to the other would be on an agreed fee basis.

It is submitted that unknown to KBT, JM had other ideas. The facts of this matter which culminated in this appeal before this court is one of them. For brevity and ease of reference, Standard Chartered Bank Malaysia Berhad would be termed as the plaintiff and M/s. Clough Thuraisingham & Jeya Mahesan would be termed as the defendant for the purpose of this appeal.

The cause papers relevant to this appeal are contained in the Appeal Record. There are:

(i) Summons and statement of claim dated 13 January 1999;

(ii) Statement of defence dated 16 February 2000;

(iii) Amended notice of application dated 30 November 1999;

(iv) Affidavit affirmed by David a/l Anthony on 22 November 1999 ("the plaintiff's affidavit);

(v) Affidavit in reply affirmed by KBT on 14 April 2000 ("the defendant's affidavit"); and

(vi) Affidavit in reply affirmed by Intan Zubaidah Kamaruzzaman on 9 May 2001 ("plaintiff's reply).

It is trite law that this appeal before me is by way of a rehearing whereby this court is not fettered by any discretion previously exercised by the learned Sessions Court Judge. I would do no better than to quote *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 where the then Supreme Court laid down the following proposition:

> The approach to be taken by an appellate court in an Order 14 appeal has been settled. The first principle is that the appeal court should not regard the appeal as reviewing of the exercise of the judge's discretion but should in practice approach the appeal as a rehearing.

By virtue of the provisions provided under O. 26A of the Subordinate Courts Rules 1980, the burden is on KBT to satisfy the court that there are issues or questions in dispute that ought to be tried or that there ought for some other reason to be a trial. In other words, KBT must show a triable issue or issues that merit a trial. The underlying principles of a summary judgment application are these:

(i) summary judgment can only be entered in clear-cut cases (see *Malayan Insurans (supra)* at p. 185;

(ii) the defendant need not show a complete defence. The defence set up need only show that there are triable issues (see *Bank Negara Malaysia v. Mohd. Ismail & Ors.* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14), where the court stated:

> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.
>
> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other documents by the same deponent, or is inherently

> improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

(iii) unconditional leave to defend must be given if there is a substantial question to be tried or there is a dispute as to facts or law which raises a reasonable doubt that the Plaintiff is entitled to judgment (see *Gunung Bayu Sdn. Bhd. v. Syarikat Pembinaan Perlis Sdn. Bhd*. [1978] 2 MLJ 332 at 336, where the court stated:

> What is clear to us is that there appears to be a plenitude of triable issues. It is trite law that leave to defend must be given unless it is clear that there is no real substantial question to be tried *(Codd v. Delap)* or unless there is no dispute as to facts or law which raises a reasonable doubt that plaintiff is entitled to judgment.

I think with these principles in mind, I shall now turn to the facts of this appeal before me. The plaintiff's claim against the defendant may be summarized as follows: It was alleged that at all material times, the defendant was a Current Account Holder No. 300-141781066 in the plaintiff's bank. By a letter dated 15 April 1997, JM on behalf of the defendant informed the plaintiff of the merger and informed the plaintiff that the operating conditions of the account remains the same. Two specimen cards executed with the defendant's rubber stamp were also enclosed. (However it is noted the specimen cards were not exhibited in the plaintiff's affidavit). Pursuant to a letter dated 21 November 1997, the defendant requested the plaintiff to honour a cheque dated 20 November 1997 for the sum of RM100,000 although the defendant had a balance of only RM1,471.34 in the defendant's account. Although not expressly pleaded, by necessary implication, the plaintiff had granted a temporary overdraft of RM98,528.66 to the defendant to cover the shortfall of the said cheque (see exh. "DA4" of the plaintiff's affidavit). Interest at the rate of 14.05% per annum calculated daily was levied on the outstanding sum. Despite repeated demands, the defendant had failed to pay the alleged sum outstanding which stood at RM109,344.14 at 31 August 1998. Hence, this legal suit.

The defendant's defence is three prong. JM acted outside the scope of his authority, be it actual or apparent authority in opening and operating the said Current Account at the plaintiff's bank. In short JM was not given any mandate by the defendant to open and operate the said Current Account. Even if the opening and operating of the said Current Account was within the scope of JM's authority (which is denied by the defendant, the request for a temporary overdraft facility was not connected with the defendant's ordinary course of business or was not an act done for carrying on business of the partnership but carried out in JM's own capacity and therefore does not bind KBT. The plaintiff's loss was caused and contributed by its own negligence in allowing JM to open and operate the Current Account without adhering to the plaintiff's own rules and regulations governing the opening of a partnership current account and in allowing JM the temporary overdraft facility without proper investigation. I think the question that begs to be answered is whether the defences highlighted above are *bona fide* triable issues. As highlighted previously, KBT need not show a complete defence. All KBT has to show is a triable issue raising a reasonable doubt that the plaintiff is entitled to judgment.

To start of with, it must be reminded that two legal firms merged and became a firm of solicitors in the name and style of M/s Clough Thuraisingham & Jeya Mahesan, the defendant on 15 March 1997. What is the effect of a merger or an amalgamation? This position is not provided in our Partnership Act 1961 ("the Act") which mirrors the English Partnership Act 1890. In one of the leading books on partnership, *Lindley & Banks on Partnership* (16th edn) at p. 591, the author stated:

> … as a matter of law, a change in the composition of a partnership results in a dissolution of the existing firm and the creation of a new firm, in such a case the new firm will usually take on the assets and liabilities of the old without any break in the continuity of the business. This is often referred to as a 'technical' dissolution and is usually, but not always, the result of agreement.
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> In contrast, the expression of 'general' dissolution is used to denote a dissolution involving a full scale winding up, which may well be brought about at the instance of one partner, against the wishes of the others.

This passage was quoted with approval by our High Court in *Sukhinderjit Singh Muker v. Arumugam Deva Rajah* [1998] 2 CLJ Supp 110, it is stated:

> At page 40 of *Lindley Lindley & Banks on Partnership* (16th Ed), the author was of the view that where there is a change in the partners, the members of the "new" firm may agree with the "old" members that the partnership should be treated as continuing and that all existing rights and obligations

> should be effectively taken over by the new firm. However, as far as third parties are concern, such an agreement is *res inter alios acta* (a transaction between others does not prejudice one who was not a party to it) unless they consent to be bound thereby.

Further at same page, the author has this to say:

> It naturally follows that any contract into which the firm has entered may be determined or breached by such a change. If, on its true construction, the contract is framed solely by reference to an existing firm, it will be determined by any change in its members. This is illustrated by the decision in *Tasker v. Shepherd* where two partners appointed an agent for four and a half years and one of them died before the expiration of that period. It was held that the surviving partner need no reference to the existing partnership, the contract being for four and a half years but only if the parties should live that long. Similarly, if the contract is of a personal character, which is only to be performed by the individual partners who have entered into it or is otherwise dependent on their particular attributes, a change in the firm will determine the contract by rendering its performance impossible.
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> If, on the other hand, it can be inferred that the contract is to be performed by the firm as from time to time constituted, then a change in the partners will not *per se* determine the contract or constitute a breach of it. However, this is a pure question of construction in relation to each individual contract, and no general principles can usefully be formulated.

From the propositions set forth, the effect of a merger is to result in a technical dissolution of the respective legal firms unless otherwise agreed upon between parties. Here, it was expressly and impliedly agreed between KBT and JM that each of them would maintain a separate client and office account and that they would operate its own accounts without the other having a right of access to the same. Of course this does not affect the plaintiff. However, if the new firm ie, the defendant is to open and operate a current account with the plaintiff bank, then mandate and authorization is needed from both KBT and JM. The plaintiff's rules and regulations relating to the opening of a partnership account must be followed. This was averred at para. 4.4.1 of the defendant's affidavit and pleaded at para. 12 of the defence. It must be noted that in reply to the defendant's positive averment, the plaintiff at para. 12 of the plaintiff's reply merely denied the said paragraphs claiming that the averments had no merits. That was a bare denial. No evidence was put forth. The defendant's purported application *vide* letter dated 15 April 1997 (exh. "DA1") contained two enclosures; one of them being the specimen cards. That was mysteriously left out from the affidavit. Since specimen cards were requested by the plaintiff, it can reasonably be inferred that the plaintiff was of the view that a new firm had come into existence. Following the plaintiff's rules and regulations, the

plaintiff is under a duty to obtain and witness a written mandate of authority executed by all the partners authorizing the opening of a partnership current account. No explanation was proffered as to whether the plaintiff followed its rules and regulations for opening a partnership current account was given. I can only suspect that the specimen cards contained the signature of JM being the only lawful signatory of the defendant since KBT had no knowledge whatsoever. Till date it is noted why the plaintiff's rules and regulations were flouted especially the procuring of a written authority signed by all partners authorizing the opening of the current account and the signatories to that account. I am of the view that there was a technical dissolution of the respective legal firms owned by KBT and JM. When KBT and JM merged, a new partnership came into existence. Since there is now in existence a new firm of partnership ie, the defendant, in order to open and operate a new current account with the plaintiff, mandate and authorisation is needed from both KBT and JM. This is in line with the plaintiff's own rules and regulations relating to opening a new partnership account. See para. 4.4.1 of the defendant's affidavit (p. 69 of the Record of Appeal ("RA"), and para 12 of the defence, p. 27 of the RA. Since there was merely a bare denial contained in the plaintiff's affidavit in reply, and there was no reply of any sort in the plaintiff's submission, I am of the view that the plaintiff is under a duty (i) to obtain a photocopy of all identity cards of every partner as well as a practising certificate, (ii) to obtain and witness a signed written mandate of authority from KBT and JM and (iii) to obtain signed specimen cards from KBT and JM. It is only reasonable to conclude that there was lack of authority in opening and operating the Current Account.

In any event, the plaintiff's manager in granting the Temporary Overdraft had breached the Plaintiff's rules and Regulations since the plaintiff failed to follow its own Rules and Regulations namely:

(i) To obtain and witness a signed, written mandate of authority from all the partners of the defendant authorising the said overdraft;

(ii) To take inquiries of the defendant upon request by JM for the said overdraft facility;

(iii) To obtain authority from its headquarters to authorize the said overdraft.

See para. 4.4.2 of the defendant's affidavit.

Despite the positive allegations of KBT, in para. 4.42 of the defendant's reply, the plaintiff failed to disclose any documents to indicate to this court that the Plaintiff's Rules and Regulations had been complied with. I think it is not incredible to state that the plaintiff's manager was aware of its own Rules and Regulations and of the need to be bound by them in discharging the plaintiff's business. It is therefore incumbent upon the court in these circumstances to inquire whether the opening of the Current Account and the granting of the Temporary Overdraft for a substantial sum without any security by the plaintiff manager, agents or servants were merely acts of sheer negligence or whether they speak of overt act indicative of a more sinister motive, perhaps leading to criminality. In view of the bare denials of the plaintiff coupled with the fact that the plaintiff should or ought to have disclosed the relevant information and documents in the light of all the allegations set out in the defendant's affidavit, I am of the opinion that the circumstances of this case show some other reason for a trial as circumscribed by Meggary J in *Miles v. Bull* [1968] 3 All ER 632. There could be a remote possibility that the transaction which is the subject matter of this appeal could be tainted with fraud or illegality. However, until and unless the defendant/KBT is given the opportunity to illicit the necessary information *via* discovery or interrogatories, it would be impossible to bring home the said allegations. Hence, in the circumstances of this appeal, it is the duty of this court to exercise its discretion in favour of the defendant to enable the defendant opportunity to bring the full facts of this transaction to light.

In the *Rubber Industry (Replanting) Board v. Hongkong and Shanghai Banking Corporation* [1957] MLJ 103, the bank allowed a current account to be opened by a rogue without proper verification in a third party's name. Subsequently a cheque in the name of the third party was paid into the account. The money was withdrawn and the rogue absconded. The true owner of the cheque sued for conversion. The High Court judge, after going through the authorities pertaining to this area of the law held that there are two transactions here. The first was the opening of the account and the second was the collection of the cheque by the bank. The judge (at p. 206 of the report) then held that there was negligence on the part of the defendant bank, whatever test applied in the opening of the account and such negligence affected the latter transaction. In *Marfani & Co. Ltd. v. Midland Bank Ltd.* [1968] 2 All ER 573, the English Court of Appeal, per Lord Diplock, was of the view that the inquiries a banker should make depends on current banking practice and change as the practice changes (see p. 579). At p. 582, it was held that a banker must exercise reasonable care in all the circumstances of the case. The bank was held not to be negligent as steps taken were in accordance with the general practice of the defendant bank (see p. 585). I am of the view that apart from the lack of

authority by JM to open and operate the current account, premised upon the factual scenario laid out, the plaintiff bank could be negligent in not allowing the Plaintiff's own Rules and Regulations. The plaintiff in the Plaintiff's Reply did not rebut the KBT's averments on the Plaintiff's Rules and Regulations set out in para. 4.4.1 of the defendant's affidavit or whether proper procedure was followed. There was only a bare denial. In this context, it is apt to recapitulate the wise words of Mohd. Azmi FCJ in *Bank Negara (supra)*:

> (1) In an application under O. 14, the court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. A complete defence need not be shown. The defence set up need only show that there is a triable issue.
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> (2) Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application.

Premised upon the aforesaid, I am of the view that a triable issue has been shown. I am also of the view that the circumstances of this case show 'some other reason to be a trial'. The phrase 'there ought for some other reason to be a trial' was inserted in O. 14 r. 3(1) of the Rules of the High Court 1980 (in *pari materia* with O. 26 r. 3 of the Subordinate Courts Act 1980) to bring and ensure that justice is done to all parties. Megarry J in *Miles v. Bull* [1968] 3 All ER 632 especially at p. 637 of the report had this to say of that phrase:

> These last words seem to me to be very wide. They also seem to me to have special significance where (as here) most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and specific issue which ought to be tried, but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgement for the plaintiff.

This proposition of law has been adopted and approved by our apex court in *United Merchant Finance Bhd. v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151 where the Federal Court applied *Miles v. Bulls* and granted the defendants unconditional leave to defend. Here the plaintiff had in control the specimen cards. The plaintiff knew how the Current Account was conducted eg, who in fact applied and opened the Current Account, the authorised signatory, or the person who operated and signed the cheques. All these can only be elicited by discovery, interrogatories and cross-examination of relevant witnesses. In short, in the interest of justice, KBT deserved the right to be heard in a trial and be given every opportunity to elicit all the necessary documents to defend this action. It is noted that the plaintiff sought to rely on ss. 7 and 10 of the Partnership Act 1961 ("the Act"). However, the plaintiff had failed to take reasonable care in opening the Current Account of the defendant. Adopting the principle laid down in *Rubber Industry (Replanting) Board. v. Hongkong and Shanghai Banking Corporation* [1957] MLJ 103, since it is true that the plaintiff had not followed its own Rules and Regulations, it necessary follows that the plaintiff was negligent. In these circumstances, the plaintiff cannot seek refuge from ss. 7 and 10 of the Act.

The following sections in the Act are relevant for the issue of temporary overdraft – not in the ordinary course of business of the defendant.

Section 7 – Power of partner to bind firm

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that the has no authority or does not know or believe him to be a partner.

Section 12 – Liability of firm for wrongs

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act.

Section 13 – Misapplication of money or property received for or in custody of firm.

In the following cases, namely:

(a) where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and

(b) where a firm in the course of its business receives the money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss.

Section 14 – Liability for wrongs and several

Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under ss. 12 or 13.

The position of these provisions are best summed up by *Lindley & Banks on Partnership* (16th edn) at p. 251:

> The operation of section 5 of the Partnership Act 1890 may be summarised in this way:
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> (1) An act done by a partner on behalf of the firm and within the scope of his actual authority will bind the firm, whether or not the act was done in carrying on the partnership business in the usual way.
>
> (2) An act done by a partner on behalf of the firm in the course of carrying on the partnership business in the usual way, will *prima facie* bind the firm, even if the partner acted without authority, unless the third party with whom he dealt knew of that lack of authority or did not know or believe him to be a partner.
>
> (3) An act done by a partner on behalf of the firm otherwise than in the course of carrying on the partnership business in the usual way will *prima facie* not bind the firm, in the absence of express authority or subsequent ratification by the other partners.

In *Polkinghorne v. Holland & Anor.* [1934-35] 51 CLR 143 at 156 the majority of the High Court in Australia had this to say:

> the difficulty of the case really lies in determining what is within the course of a solicitor's business. By associating themselves in a partnership with Harold Holland, the respondents made themselves responsible, as principals are for an agent, for all his acts done in the course of his authority as a partner. That authority was to do on behalf of the firm all things that it is part of the business of a solicitor to do. If, in assuming to do what is within the course of that business, he is guilty of a wrongful act or default, his

partners are responsible, notwithstanding that it is done fraudulently and for his own benefit (*Lloyd v. Grace, Smith & Co*. But, to make his co-partners answerable, it is not enough that a partner utilises information obtained in the course of his duties, or relies upon the personal confidence won or influence obtained in doing the firm's business. Something actually done in the course of his duties must be the occasion of the wrongful act.

One must now ask the question whether the request for temporary overdraft by JM was within the course of carrying on the partnership business as solicitors in the usual way. If the answer is in the affirmative, then the act of JM binds KBT irregardless whether it was done fraudulently or for his own benefit. In Malaysia, the business in which solicitors engage in involve *inter alia*, use of their skills and experience in advising, negotiating, drafting commercial contracts, drafting pleadings or affidavits and prosecuting or defending a claim for their clients. I think a firm of advocates and solicitors like the defendant is not in the trading business and borrowing of monies from financial institution is not part of a solicitor's business. In *Lindley & Bank on Partnership* (16th edn), at p. 264, the author was of the opinion that "The implied power of a partner to borrow money will only exist where the firm's business is of such a kind that it cannot be carried on in the usual way without such a power. In the case of a pure cash business or a business where borrowing is not strictly necessary the firm will not be bound unless some actual authority or ratification can be proved." Two cases were cited in support. In *Plumer v. Gregory* [1874] LR 18 Eq 621 at 629, whereby two solicitors were sued by the clients for monies taken by them. It was held that one partner has no authority to bind the other partner for borrowing money, unless it is borrowed in the usual course of business and for business purpose.

In *Higgins v. Beauchamp* [1914] 3 KB 1192, it was held that "A firm carrying on the business of cinematographic theatre proprietors is not a trading firm for the purpose of the rule that each member of a trading firm has implied authority to borrow money on the credit of the firm for partnership purpose".

I am of the view that even if we take the plaintiff's case to the highest, ie, JM has the authority to open and operate the Current Account (which is denied), applying the proposition of law enunciated above, the request for a temporary overdraft facility was not within the ordinary course of business of solicitors. It is not part of a solicitor's business to borrow money. For KBT to be bound by the acts of JM, there must be express authority given by KBT or the application for temporary overdraft ratified by KBT. In the defendant's reply, KBT had averred that JM "was, in truth, acting in his personal capacity in opening, converting and operating the said account and in obtaining the overdraft facility". KBT further denied authorising the application and that the proceeds

of the overdraft were never received by him. It is observed that the plaintiff relied on a letter dated 21 November 1997 (exh. "DA1", plaintiff's affidavit) to bind the defendant. That letter was written by JM. The purpose of the overdraft facility or why the cheque was issued was not mentioned. Such a request should and ought to have put the plaintiff on notice. Written authority to confirm the request should and ought to have been obtained from KBT since such a request was extraordinary and not in the course of the defendant's business as a firm of advocates and solicitors. Premise upon the principles to a summary judgment application above, that these are *bona fide* triable issues and "there ought for some other reason be a trial". As to temporary overdraft was not within the ordinary course of the defendant's business, again the plaintiff relied on s. 7 of the Act. However, an act done by a partner of the firm otherwise than in the course of carrying on the partnership business in the usual way will *prima facie* not bind the firm in the absence of express authority or subsequent ratification by other partners. See also *Polkinghorne v. Holland* [1934-35] 51 CKR 143 at 156. In this appeal, the firm concerned is a firm of solicitors, not a trading company or a firm engaged in sales. A firm of partnership concerning a trading company whereby liquidity of funds is essential, borrowing of money is necessary for the firm's business to be carried out. As for a firm of solicitors, I think that a request for the Temporary Overdraft was not within the ordinary course of business of solicitors. Further KBT had stated positively that he had neither authorised JM to apply for the Temporary Overdraft nor did he know anything about it. The authorities cited: (i) *Chop Cheong Tuck v. Chop Tack Loong & Ors.* [1934] MLJ 176 and (ii) *Chan King Yue v. Lee & Wong* [1962] MLJ 379, were concerned with trading companies. The case of *Chop Cheong Tuck* concerned a firm of merchants. The case of *Chan King Yue* concerned a firm of electrical engineers. Since these firms were there exist an implied power for a partner to borrow, the firm will be bound by the acts of a fellow partner that had borrowed money. As for the case of *United Bank of Kuwait Ltd. v. Hammound & Ors.* [1988] 3 All ER 418, the case concerned an undertaking given by a partner. Undertakings given by a partner in a firm of solicitors is common. Hence the court in *Hammound*'s case found the partners liable.

This case is not fit to be disposed of by way of summary proceedings. The issues before me are factual and can only be disposed in a trial. Did JM have the authority to open and operate the current account? Was the Plaintiff negligent in allowing the current account to be opened and operated without the written authority of all partners concerned and by not following its own Rules and Regulations? Whether JM acted in his capacity? All these are questions that can only be answered in a full trial and not in a summary judgment application. I think KBT had shown more than just triable issues and

why there ought for some other reason be a trial. Having done so, KBT should not be shut out from laying his defence. I must emphasise that it is trite law that KBT needs to show only triable issues. KBT need not show a complete defence. It there is a substantial question to be tried or there exists facts which raise reasonable doubt, then a defendant must be given unconditional leave to defend. Further, most of the relevant documents and facts are under the plaintiff's control eg, the specimen cards, the agent of the plaintiff that allowed the Current Account to be opened. Here, the specimen cards were not exhibited. Nor the persons concerned with these transactions made any affidavits. In this scenario "there ought for some other reason be a trial", and the plaintiff ought to be put to strict proof of his claim where the defendant will be afforded the opportunity to elicit all necessary documents to defend this action. In the upshot, this appeal is allowed with costs and that the defendant is hereby given unconditional leave to defend.